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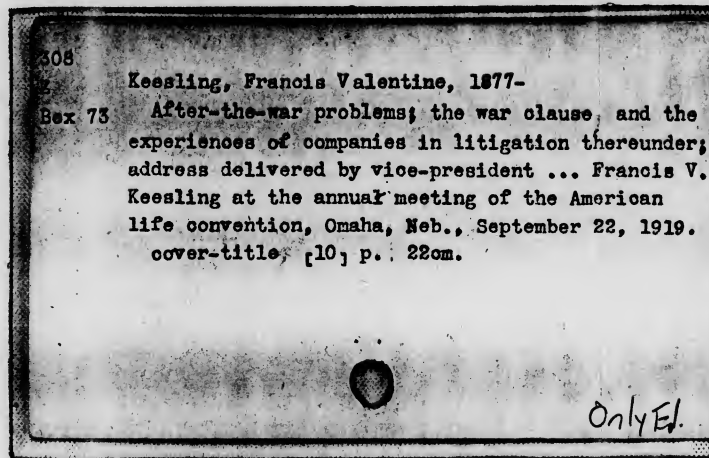
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After-the-War Problems

The WAR CLAUSE, and the Experiences of
Companies in Litigation
Thereunder



Address Delivered by Vice-President and General Counsel Francis
V. Keesling at the Annual Meeting of the American Life
Convention, Omaha, Neb., September 22, 1919

7.4.66

26 March, 1920 - C. R. W.

After-the-War Problems

The WAR CLAUSE, and the Experiences of Companies in Litigation Thereunder

By FRANCIS V. KEESLING

The subject which naturally suggests itself primarily is the war clause and its interpretation by the courts. Splendid, as an evidence of the generous spirit of life insurance companies, consistent with the general attitude of life insurance managers, is the action of many companies which have adopted the policy of paying war service claims without question so far as restriction is concerned. We realize that this has been done because, fortunately, the toll of life, though, individually, a supreme sacrifice, as a whole constituted but a small percentage of those engaged. It may be said that this is not generosity, but the fact that payments have been made when effective defense might have been interposed, is an answer to any such statement. Not many companies have been drawn into litigation for the purpose of interpretation of war clauses. The cases which have been decided are few and I have no doubt you are all familiar with the rules laid down.

So far as existing clauses are concerned and cases that may arise under them, it would seem that discussion as to the interpretation thereof would be purely academic, because the courts will finally attend to that. If there be desire to anticipate what troubles there might be, should one be drawn into a controversy, such a discussion might prove interesting.

The value of a discussion will depend upon what the policy of the companies will be with reference to the continu-

ance or discontinuance of war clauses in policies. Those who have the formulation of policy will do well to consider the fact that, though they had been generous in their advertisement that their policies were free from military restriction, the moment that we became involved in war, it became necessary by reason of the experience of insurance companies in other countries to consider the cold actuarial facts. The war restriction became necessary. That being so, unless there be no further possibility of war, and perhaps there may be something in the League of Nations which will reconstruct the human being so that the nations will hereafter dwell in peace on earth, it is my opinion that, in fairness to the insuring public, who, though insured under policies without restriction, may, in event of exceptional loss due to war hazard, be deprived of that for which they paid, there should be some reasonable restriction as to military and kindred service in insurance policies.

There have been but few decisions affecting war clauses in England, Canada, Australia, New Zealand and the United States, but these afford considerable information as to the meaning of the various wordings of such clauses. Provisions of such clauses have been attacked on the ground that they are contrary to public policy, but such contention has not been sustained. In an English case, where a soldier patrolling a railroad was accidentally killed by a train, under a policy subject to the condition that it did not insure against death "directly or indirectly caused by, arising from, or traceable to * * * war" recovery was precluded. While in an American case where the wording was "shall die * * * as a result, directly or indirectly, of engaging in such (military or naval) service or work" it was held, "it is clear that the language was used for the purpose of limiting liability to the return of premiums in cases where death resulted directly or indirectly from some cause peculiar to the military service and one not common to military service and civilian life" and that, as deceased came to his death by an accident while riding a motorcycle under circumstances which were not in anywise peculiar to the military service, and, as civilians are killed almost daily under similar circumstances and the hazards were no greater because the insured was engaged in the military service, the plaintiff

was entitled to recover the full amount of the policy, and it was also held that the case was clearly distinguishable from the English case.

I am of the impression that it was the general intention that the restriction should apply from and after enlistment and that death while in the service should preclude recovery if there had been violation of the restriction and this was due to change in occupation and condition of the insured. The companies, however, quite generally issued "free permits" for service within the continental boundaries of the United States, but uniformly the issuance of a permit for foreign service was conditioned upon the payment of an extra premium and the restriction. The interpretation of the particular clause above quoted, based upon what the court claims to be the evident intention to the contrary, would seem to defeat the intention of the company. If, therefore, the companies do desire to exercise a control over the premium required, should the insured enter military service, owing to the tendency of some of the courts evidenced by their construction of such phraseology as "As a result of such service," or "while engaged in such service," the safest wording would seem to be that which restricts against "death while in, or as a result of," the service. Under such circumstances, where death had occurred while in the service, the court would not be concerned with what might be death as a result of military service, or whether or not even after enlistment the insured had "engaged" in military service.

In one of these cases the court stated "an insurance company has the right to select the particular risk it is willing to assume." That seems to be reasonable, and it would seem unnecessary to except the provisions relative to military restrictions in the incontestability clause, yet the tendency of the courts in the construction of the effect of that clause would warrant, in an abundance of precaution, exception of the war restrictions. In some cases where the death of the insured occurred while in the service within the United States, the same desire to be liberal which moved the companies to issue "free permits" for service within the United States, has no doubt influenced the courts in their construction of the clause favorably to the insured under such circumstances. Unfortunately, however, this liberal reasoning of the courts is also applicable to service abroad and

death resulting from an actual engagement would be necessary for an effective defense under clauses so construed. The interesting comment of a judge of a District Court of North Dakota has some bearing upon the necessity of military restriction. He states in effect that while a man is in training he is better and safer than if he were at home. I do not know just what the legal force of that argument may be, but, as expert advice, it ought to be of interest to our actuarial friends.

I have often been concerned with whether or not the insurance contract can be simplified. So far, I have given it only superficial consideration, without much success. It is self-evident that a contract readily understood by the ordinary individual would reduce the number of problems. These words are used by a court "we should adopt that construction which we think the insurer had reason to suppose was understood by the insured." It would be worth the effort to give this subject careful and earnest consideration. I am free to admit difficulties which beset me, resulting, in some instances, almost to brainstorm in the attempt to determine just what is meant by the terms of some insurance policies, which, however, were not life policies. The cross reference plan may be necessary, but it is abominable. I would not be understood as casting any reflection upon agents, but complexity of language affords a great temptation to make statements, which, while too often false, are more frequently diplomatically indefinite and uncertain. Perhaps, too, it might relieve from adverse interpretations owing to what the courts allege to be ambiguity and uncertainty.

Generally speaking, companies must be alert to anticipate before being compelled to action. The problems so far considered seem to me to be of minor importance as compared with the responsibility imposed upon the lawyer or other responsible party relative to legislation. In this regard fundamental conditions must receive attention. Experience will demonstrate, if it has not already done so, that even a righteous cause has but little chance where the selection of those who must give it consideration has been made against one.

Just how far there has been regeneration in the world as a result of the war is problematical. Its commanding grip on the individual has certainly been productive of more thought than usual concerning conditions generally and be-

yond the confines which selfish character ordinarily restrict him. Whether the result will be good or bad depends entirely upon how unselfish, how considerate the individual is, and how much intellectual capacity he has. The awakening, if such it is, if general enough, I believe can be productive of good in the solution of the problems which confront us.

Unsatisfactory conditions prevail and have prevailed. A portion of our people have not been entirely successful in the pursuit of happiness. Individuals, thoughtful and otherwise, giving these matters their attention have initiated movements for the improvement of conditions which have been sincere and insincere of purpose, but, unfortunately, in the effort to bring about better conditions, the existing conditions having been charged to Government, a formidable movement to place more power in the hands of the people has resulted in a departure from representative form of Government toward that which is known as pure democracy. It has resulted in the adoption of the direct primary, the initiative, the referendum, the recall and in the suggestion of that most drastic and dangerous of all suggestions—recall of judicial decisions. I am firmly convinced that the responsibility was not primarily chargeable to Government, but was almost entirely chargeable to the people. Failure to exercise the right of suffrage has resulted in administrations which have failed in the performance of duty. The people, having failed in the performance of their limited duty, what may be expected when there is thrust upon them a greater responsibility with the character of the individual unchanged. This tendency to neglect the assumption of responsibility is a forceful argument in favor of the interposition of the representative Government to prevent as far as is possible class legislation as contradistinguished from legislation, as it should be, for the general welfare. If we analyze what is going on about us dispassionately, we note, as a result of the operation of these laws, more and more tendency to class influence regardless of the general welfare. The same careless individual is guided by the recommendation of the chamber of commerce or some other mercantile association because he has not either the time or the inclination or the ability to determine what he should do. On the other hand, we have another individual guided in a similar manner by the recommendation of a trade union

or the socialist organization or whatever the organization may be, and it is class influence necessarily. While there was such influence under the more representative form of government, it has become all powerful under the existing system. Witness its effect on candidates for office. How anxiously they seek an endorsement, considering only the number of votes it carries without considering the obligation which may bind them to the enactment of legislation clearly contrary to the general welfare. Witness the defeat of the conscientious and able candidate who defines his independence. Without entering into the merits of the question, as it is a passing event, what possible bearing can there be upon the capacity of a candidate for office by reason of approval or disapproval of home rule for Ireland? Without questioning his sincerity of belief, is it not rather an appeal to the Irish vote of the country for the furtherance of his own selfish ends? What bearing has it on whether there should be a protective tariff or Government ownership of railroads or on any American issue? The result is monte-bank mayors and other officials lacking force and independence of action. There is a tremendous burden imposed on the patriot who stands for the general welfare either as a candidate for office or otherwise because of righteous civic pride. The difficulties of the system inaugurated deter many splendid men from becoming candidates and the drift into irresponsibility in the selection of candidates will be reflected in the character thereof and tend to perpetuation in office which is distinctly un-American. Is the general welfare to give way to class welfare? Will the ignorant, led by class leaders, due to existing too general indifference, gain control? It is a sorry spectacle which we frequently witness nowadays of the brave ones, who, yesterday, would have been fearlessly independent, departing into the highways and by-ways of opportunism which characterizes, not the real politician, but the job-chaser. As it affects the legislative and executive departments of Government, so does it affect the judicial, the last, fortunately, not so much yet, but what will the end be if things are permitted to drift in the same general direction?

Must we not now determine whether private ownership of property is to continue? What is likely to be the result with the instrumentalities at hand due to indifference and lack of intelligence? It must be unnecessary to detail to

men such as you the argument against anything which will prove destructive of initiative of the individual. The human being is inherently selfish in varying degrees and there must be incentive. It is a characteristic which must be recognized. It has been said that there is wrong thinking about government. There certainly is and there has been too much influence of those who have been driven almost to desperation under other forms of government and have been led to believe that similar conditions prevail in this country. Initiative should be given full play, but there should be just distribution of production. The value of executive ability, inventive and constructive genius should not eclipse the value of component laboring, mechanical and other elements. But this individuality under-valued, and necessarily, if destroyed, will result in the loss of production because of unused latent power of production lacking direction. The works of these capable men may be operated for awhile by the mediocre and even incompetent. They may attempt to emulate, and may partially succeed, but there will follow retrogression, decay, loss of production and certainly there will be no progression. What can more clearly answer the preposterous claims of those who advocate destruction of law and order and the assumption of production by the unguided masses than the terrific results in Russia? It has been said that "the outstanding difference between Russia and the United States is that the Russians quit working altogether, while here the progress toward 'a richer life' is more gradual." I believe we are facing an adjustment due to conditions which long ago confronted the nations of the old world and everything must be done that can be done to prevent such stratification as exists there. We have not given these matters such consideration as we might have because of the hitherto existing plethora of undeveloped wealth of this country.

I speak as one who does not regard his personal convenience as more important than the rights of men who strike for better conditions, nor do I bewail the fact that there may be a strike. My desire is to know, under such conditions, what is the difficulty—what can be done? I appreciate that all can not be well when an institution, such as a great express company, can, to use the vernacular, "cut large melons" for its stockholders and pay large salaries to its executives, while poorly remunerating its employees,

leaving them in old age without a competence and depending upon others, even though industrious and frugal. I appreciate the dangers that arise from a monopoly of the food supply and I firmly believe that there should be a limitation on the activities of any industry, notwithstanding their claims of economy in production, because such control is not for the general welfare. Less economy, as contradictory as it may seem, may prove practically to be more for the general welfare. I believe that the activities of the packers are too extensive and that there should be limitation and, if intelligent limitation can be devised, that, in the segregation into parts, such disposition be made that it shall not be as was the case in another compelled dissolution and segregation, whereafter the same owners ultimately controlled. I speak with a realization of the wrongs which have resulted from the control of funds whereby a coterie of men have been able to approve or veto development. All these ills can be remedied by and through our representative institutions. It can not be accomplished by means of a system which promotes class legislation. I challenge the right of any individual or group of individuals to say to the American people that they are "in no mood to brook" this, that, or any other kind of action on the part of the Government. There is a grave responsibility on those who have created the unreasoning discontent which exists. In adjustments there should be no prejudice that because the suggestion emanates from a union or from a corporation it is wrong because of that fact.

It is now popular to condemn everything that is, too frequently without constructive suggestion. Our courts have not escaped, nor have they been uninfluenced by fault-finding. I am a firm believer in our judicial system. Improvements can be made no doubt but there is radical difference as to method. I am unalterably opposed to any method which will subject the judiciary more than it now is to political influence, favoring, in any event, longer terms, but preferably some satisfactory system of appointment for a term co-extensive with good behavior. Some have the impression that Australia is radical, being dominated by labor, but this at least is true—they fully realize the importance of the judiciary and bar and those institutions are cherished and more carefully safeguarded than they are here. It is incumbent to preserve respect for the courts.

I fully appreciate the shortcomings of individuals who have disgraced that institution and violated their trust. I know from personal experience the desperation which besets one when a cause has been wrongfully lost. That, however, is not in itself sufficient to warrant the condemnation of the institution nor its destruction. Technicality has played too great a part in procedure. No cause which should be decided on its merits should be defeated by technicality. That, however, does not justify free and easy procedure made possible by removal of safeguards so essential to a determination of the real facts. Objection has been made to the power of the courts to construe the constitutionality of legislation. There is an unintelligent use of the term—"Judge-made Law." If we are to abide by a constitution, that power of the courts is a proper check. There would be less criticism because of less frequent consideration of constitutional questions if legislators did their full duty and refused passage of legislation clearly unconstitutional. It is often passed with a knowledge of shirked responsibility that the onus might be on an already over-burdened judiciary. It is not unknown that lawyers by artful or other methods have succeeded in prevailing in a trial court and then, in preparation for what they knew to be certain reverse in a court of appeal, to seek to create prejudice of that court by declaring that naturally the "controlled" court would defeat their "just" cause.

Have we gone too far afield? We have if we are to be satisfied with superficial consideration of our problems. If one is satisfied with the superficial he is only temporizing. The welfare of insurance companies is closely allied with everything that affects the general welfare. I need only to mention the stability and availability of investments. It is only a step from government ownership of railroads to government ownership of other businesses. Good and intelligent legislation depends upon proper representatives whose independence is safeguarded and upon public right-thinking as to government. The duty of supporting American institutions to safeguard the public welfare is an important one resting particularly upon lawyers. In the practice of his profession the lawyer becomes peculiarly well equipped for public service. Such service can only be satisfactorily performed if there is confidence arising from respect. Lawyers have been too remiss in the performance

of their duty to their profession. It is too fashionable to ridicule this most honorable of all professions. What may have been occasioned by, or may be applicable to, the black-legs in the profession, who are few indeed compared to the numbers who conduct themselves so as to be above all suspicion, must not without protest be permitted to characterize the great majority. To this end lawyers must rally to the support of the profession. They must assume the responsibility of intelligently placing before the people a sane presentation of the facts at all times and everywhere, taking advantage of every opportunity. It is high time to counteract the constant endeavor of the agitator and soap-box orator and the effect of the twaddle and vaporings of "Linc" Steffens, Robert Minor, John Reed, Max Eastman, Rose Pastor Stokes, Ben Reitmann and their many ill-advised parlor disciples; being concerned, not so much with methods of prevention of the activities of the radical, as a realization of the full importance of inducing right-thinking by reason of the fact that such individuals have audiences. I can imagine nothing more terrible than government of the people by the foul-mouthed agitator or the weak-minded radical. They have the audacity to liken some of these radical movements to the American Revolution. They are as much alike as homicide, which is murder, is like homicide which is self-defense. Some may charge that I speak as a Republican partisan. That is my political affiliation, and, while believing that that party does things a little more satisfactorily than any other party, I am not so bigoted that I fail to recognize the success of another party in the administration of the affairs of government. That being so will warrant confidence in our system of government. It would be a sad commentary if there were only one party capable of administering our affairs. In this dissertation I have faithfully endeavored not to be influenced by any partisan prejudice.

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